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CHALLENGING STATE ACTS OF AUTHORIZATION UNDER THE FOURTEENTH AMENDMENT: SUGGESTED ANSWERS TO AN UNCERTAIN QUEST

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In two recent decisions, *Flagg Brothers, Inc. v. Brooks*[1] and *Jackson v. Metropolitan Edison Co.*,[2] the Supreme Court has considered anew the state action doctrine in relation to conduct authorized by the state. Each of these two cases involved a challenge, under the due process clause of the fourteenth amendment,[3] to the state-authorized conduct of a private actor. In each case, the challenger argued that the state-authorized conduct was "properly attributable to the State because the State [had] authorized and encouraged it."[4] In both cases, the Court, through Justice Rehnquist, rejected the challenger's contention and held that attribution of private conduct to the state is proper only "when the State, by its law, has compelled"[5] the conduct in question.

The holdings in *Flagg Brothers* and *Jackson* suggest the central question addressed in this article: To what extent are state acts of authorization immunized from judicial review on the merits?[6] Using the fact situations

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1. 436 U.S. 149 (1978).

2. 419 U.S. 345 (1974).

3. U.S. CONST. amend. XIV, § 1 provides, in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." In *Flagg Brothers*, the challenger also advanced a claim under the equal protection clause of the fourteenth amendment. 436 U.S. at 153.

4. *Flagg Brothers*, 436 U.S. at 164. In *Jackson*, the challenger argued that Metropolitan Edison Company's termination of electric service to her home constituted "state action because the State 'has specifically authorized and approved' the termination practice." 419 U.S. at 354.

5. *Flagg Brothers*, 436 U.S. at 164 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970)). In *Jackson*, Justice Rehnquist stated:

> Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into "state action."

419 U.S. at 357.

6. The holdings in *Flagg Brothers* and *Jackson* also generate an important "merits" question: When reviewed on the merits, under what circumstances will state acts of authorization be held to constitute a denial of due process or equal protection under the fourteenth amendment? While this merits question is beyond the scope of this article, its constitutional significance does counsel against an application of *Flagg Brothers* and *Jackson* that would effectively immunize state acts of authorization from judicial review. In *Flagg Brothers*, Justice Rehnquist recognized the distinction between the ultimate merits question just posed and the state action issue that he did in fact confront: "Even if there is 'state action,' the ultimate inquiry in a Fourteenth Amendment case is, of course, whether

in *Flagg Brothers* and *Jackson* as paradigms, the two types of challenges that can be made in a typical fact situation involving the state action issue are first described.[7] These two models are then discussed in relation to *Flagg Brothers, Jackson,* and other Supreme Court decisions[8] that implicate the state action issue. With that discussion as a predicate, this article next considers the procedural problems that inhere in challenging state acts of authorization in both the state and federal court systems and concludes that, in both court systems, state acts of authorization should be subject procedurally to judicial review on the merits.

I. TWO STATE ACTION "CHALLENGE MODELS"

A. Flagg Brothers *as a "State Action" Paradigm*

The facts of *Flagg Brothers* afford an excellent case study for discussion of the two state action challenge models. In *Flagg Brothers,* the Supreme Court considered a New York statute that authorizes enforcement of a warehouseman's lien "by public or private sale of the goods . . . on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods."[9] Thus, if a debtor fails to pay storage charges on goods stored with a warehouseman, the statute authorizes the warehouseman to make a private sale of the goods without state participation or supervision and provides no procedure by which the debtor may contest or block the sale.[10] The statute further provides that "[a] purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section."[11]

Acting under this statute, Flagg Brothers, Inc., a warehouseman, gave notice of pending sale to Shirley Brooks, a debtor who had stored her household goods with Flagg Brothers after being evicted from her apart-

that action constitutes a denial or deprivation by the State of rights that the Amendment protects." 436 U.S. at 155 n.4.

7. As will be explained shortly, only the first of these models truly raises the question whether there is "state action." Under the second model it is generally conceded that the act being challenged constitutes state action. *See* text following note 23 *infra*. The crucial question under the second model is the one considered by this article: Is there a procedural bar to a review of the act on the merits?

8. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Evans v. Abney, 396 U.S. 435 (1970); Reitman v. Mulkey, 387 U.S. 369 (1967); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948). While these decisions by no means exhaust the Court's encounters with the state action issue, they do have particular relevance for the procedural questions that this article is exploring.

9. 436 U.S. at 151 n.1 (quoting N.Y. U.C.C. § 7-210(1) (McKinney 1964)).

10. *Id.*

11. *Id.* (quoting N.Y. U.C.C. § 7-210(5) (McKinney 1964)).

ment. Flagg Brothers had failed in its earlier efforts to collect storage charges from Brooks. In response to the notice of sale and a "series of subsequent letters from" Flagg Brothers, Brooks initiated a "class action in the District Court under 42 U.S.C. § 1983, seeking damages, an injunction against the threatened sale of her belongings, and the declaration that such a sale pursuant to [the New York statute] would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment."[12] Rejecting Brooks' class action complaint, the Supreme Court concluded that "the allegations of [the Brooks complaint] do not establish a violation of [Brooks'] Fourteenth Amendment rights by either . . . Flagg Brothers or the State of New York. The District Court properly concluded that [the Brooks complaint] failed to state a claim for relief under 42 U.S.C. § 1983."[13] Later portions of this article discuss *Flagg Brothers* more fully. For a description of the state action challenge models, the above case summary is sufficient.

B. The Characterization Model: Is the Private Actor the State?

In the typical fact situation raising a state action issue, the challenger is adversely affected by the conduct of a "private" actor, an actor ostensibly acting in a private capacity. In this context, the focus is on the conduct of the private actor. Here, the conceptual question is whether the conduct of the private actor can be fairly regarded as the act of the state. In practical terms, the challenger is seeking to pin the state action label on the private actor's conduct. If the challenger is successful in this effort, the private actor's conduct is then treated as an act of the state and becomes subject to all the constitutional prohibitions that operate as a limitation on state power.[14]

In *Flagg Brothers,* for example, this characterization model would focus on the conduct of the warehouseman, Flagg Brothers, Inc. The challenger-debtor, Shirley Brooks, would be attempting to show that the threatened sale of her stored goods by Flagg Brothers would entail conduct that constitutes state action. This is precisely the claim made by Brooks and rejected by the Court in *Flagg Brothers.*[15] Had Brooks prevailed on her claim that the conduct of Flagg Brothers in selling her stored

12. *Id.* at 153.

13. *Id.* at 166.

14. Success in pinning the state action label on the private actor's conduct greatly increases the challenger's chances of ultimate success on the merits. This is because the Constitution's self-executing force has predominant application to governmental action and only limited application to private conduct. On this point, see Part IV of Justice Harlan's separate opinion in United States v. Guest, 383 U.S. 745, 771–73 (1966) (concurring in part and dissenting in part).

15. *See* 436 U.S. at 156.

goods should be treated as an act of the state, that conduct would then have become subject to the full array of constitutional provisions applicable to state governmental action, most particularly the due process clause of the fourteenth amendment.[16]

Under the characterization model, two conceptual techniques have been employed to show that the private actor's conduct should be regarded as that of the state. Although a detailed explication of these techniques is beyond the scope of this article, a brief description of each is helpful.[17] One technique employs a "state nexus" or "state contact" approach.[18] Under this technique, the challenger attempts to establish that multiple contacts exist between the state and the conduct of the private actor and that the number and pervasiveness of these contacts are at such a level that the private actor's conduct may fairly be called state action. Through a process of state contact entanglement, the private actor's conduct loses its private identity and is instead characterized as state action. Characterization of conduct as state action may also be sought under the "public function" technique.[19] Here, the challenger concentrates on the nature of the conduct in which the private actor is engaged rather than on contacts between that conduct and the state. The more the private actor's conduct is "governmental" in function the greater is the chance that, for

16. Had Brooks been able to establish that Flagg Brothers' conduct constituted state action, she could then have claimed that this threatened "state action" would deprive her of property without due process of law because the sale threatened by Flagg Brothers would deny her a "fair hearing" right to contest on the merits the divestment of title to her stored goods.

17. For a fuller description of the two techniques, see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 986–87 (10th ed. 1980).

18. In Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), Justice Clark's opinion for the Court is a classic illustration of the "state nexus" or "state contact" approach under the characterization model. *See id.* at 716. En route to its finding of state action on the facts before it, the *Burton* Court said: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722. See also the state nexus approach employed in Evans v. Newton, 382 U.S. 296 (1966). In *Newton* the Court held, regarding a park given to a city "for white people only," that the city's resignation as trustee of the park and the substitution of "private trustees" for the city did not remove the state action taint from the operation of the city park. The Court stated: "So far as this record shows, there has been no change in municipal maintenance and concern over this facility" resulting from the city's resignation. *Id.* at 301

19. See the Court's discussion of the "public function" technique in *Flagg Brothers*, 436 U.S. at 157–64, and *Jackson*, 419 U.S. at 352–54. In *Flagg Brothers* and *Jackson*, the Court held that the conduct challenged in those cases did not constitute a "public function" that transformed the conduct into state action. For cases in which the Court did find state action through application of the public function technique, see Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), and Marsh v. Alabama, 326 U.S. 501 (1946). On the state action issue, the Court's holding in *Logan Valley* was substantially eroded by its later decision in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), and eventually overruled in Hudgens v. NLRB, 424 U.S. 507 (1976). In another subject matter, the Court's finding of state action in the "white primary" cases is in part explainable by a public function rationale. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

constitutional purposes, such conduct will be regarded as action of the state. Although earlier Supreme Court decisions created expectations of a fairly generous application of the public function technique,[20] the decisions in *Flagg Brothers* and *Jackson* have confined the technique to a narrow category of cases: those cases involving the "exercise by a private entity of powers traditionally exclusively reserved to the State."[21] Thus restricted, the public function technique has become a relatively impotent tool in the search for state action under the characterization model.

C. *The Authorization Model: Does a State Act of Authorization Violate the Fourteenth Amendment?*

As in the case of the characterization model, this second model applies typically to a fact situation in which the challenger is adversely affected by the state-authorized conduct of a "private" actor. Unlike the characterization model, however, the authorization model concentrates directly on the state act that has authorized the private actor's conduct and not on the question whether the private actor's conduct constitutes state action. Here, the challenger is contending that the state act that has authorized the private actor's conduct is itself a denial of due process or equal protection under the fourteenth amendment. The challenger assumes that the private actor's conduct does not constitute state action. The challenger argues instead that the state has violated the fourteenth amendment by authorizing the private actor's conduct, by placing the private actor in a position where the actor may "gouge" the challenger with legal impunity.

Under the authorization model, there is little question that the act on which the challenger is focusing is an act of the state. Typically, the challenged act would be a state statute[22] or a provision in a state constitu-

20. *E.g.*, Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946). Note also the Court's expansive language in Evans v. Newton, 382 U.S. 296 (1966). In *Newton*, Justice Douglas' opinion for the Court stated that the finding of state action in that case "is buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature." *Id.* at 301. In dissent, Justice Harlan speculated that Justice Douglas' language could bring under the state action label "a host of . . . functions commonly regarded as nongovernmental though paralleling fields of governmental activity"—functions such as "privately owned orphanages, libraries, garbage collection companies, [and] detective agencies." *Id.* at 322.

21. *Jackson*, 419 U.S. at 352. In *Flagg Brothers*, Justice Rehnquist for the majority conceded that, even under his tightly confined definition of what constitutes a public function, the public function technique might still have some application among "such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment." 436 U.S. at 163–64 (footnote omitted).

22. In *Flagg Brothers*, for example, an action under the authorization model would attack the validity of New York Uniform Commercial Code § 7–210. *See* 436 U.S. at 151 n.1.

tion.[23] The statute or constitutional provision would be challenged as impermissibly authorizing the private conduct that has adversely affected the challenger. A claim based on this model, therefore, involves a claim on the merits; action clearly attributable to the state is alleged to violate the fourteenth amendment by authorizing a particular species of private conduct. Here, there is no "state action" issue in the sense described in the characterization model. No attempt is made to pin the state action label on the private actor's conduct. Instead, the authorization model proceeds directly to a review on the merits of an act that is clearly state action in the narrowest sense in which that term can be used.

In a broader sense, this model does implicate state action concerns. The conduct directly affecting the challenger is the conduct of a private actor, not the conduct of a state actor. The state is being challenged because it has authorized the conduct of the private actor. As a part of its "merits" inquiry, the authorization model thus requires a close examination of what the state has authorized. This examination, in turn, leads ineluctably into the use of techniques that parallel the "state nexus" and "public function" techniques employed under the characterization model.[24]

In relation to the facts of *Flagg Brothers,* the authorization model would operate as follows: The challenger, Brooks, would *not* attempt to show that the threatened sale of her stored goods by Flagg Brothers entails conduct that constitutes state action. Instead, Brooks would directly attack the New York statute authorizing the sale. She would contend that the statute, as applied to her, deprives her of due process of law in violation of the fourteenth amendment and that this deprivation of due process results from state action (the New York statute) that authorizes a private actor (Flagg Brothers) to divest her of title to her stored goods through the mechanism of a private sale that affords her no opportunity to contest the

23. *See, e.g.,* Reitman v. Mulkey, 387 U.S. 369 (1967). As discussed later in this article, *Reitman* is a classic authorization-model case involving an attack against the validity of an amendment to the California Constitution. *See id.* at 370–71. Additionally, state acts of authorization may manifest themselves in the form of state administrative rulings, *see* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), and through a state's common law, *see* Shelley v. Kraemer, 334 U.S. 1 (1948).

24. The public function technique bears especially close similarity to the authorization model. Functionally, both probe the question of governmental delegation of authority. In the context of the characterization model, however, the public function technique focuses on the narrow question whether ostensibly private conduct has been transformed into state action. In contrast, the authorization model permits consideration of a broader question: What are the constitutional limits on a state's power to authorize private conduct? This broader question recognizes that even in circumstances where the private nature of the "gouging" conduct is clear, the state's delegation of authority to the private actor may, in some instances, exceed constitutional bounds. Hence, the public function technique as employed in the characterization model cannot serve as a substitute for the broader inquiry embodied in the authorization model.

divestment on the merits.[25] For this claim to prevail, it is not necessary to show that Flagg Brothers is acting as the state. It is sufficient to show that, as applied to Brooks, the New York statute itself denies due process.[26]

In his opinion for the Court in *Flagg Brothers,* Justice Rehnquist analyzed Brooks' claim exclusively in the context of characterization. His entire opinion is devoted solely to the question whether the actions of Flagg Brothers were "properly attributable to the State of New York."[27] In pursuing this inquiry, Rehnquist explored both the "public function"[28] and "state contact"[29] strands of state action jurisprudence. Under each strand, he concluded that the conduct of Flagg Brothers in selling the stored goods of Brooks did *not* constitute conduct properly attributable to the State of New York.[30] Accordingly, he affirmed the district court's dismissal of Brooks' claim for failure "to state a claim for relief under 42 U.S.C. § 1983."[31]

Wholly absent from Rehnquist's opinion in *Flagg Brothers* is any consideration of the authorization model. Nowhere does Rehnquist address the question whether New York, through its legislative enactment authorizing private sale by creditors in the position of Flagg Brothers, has denied due process of law to debtors in Brooks' position.[32] It is not clear

25. Such a claim arguably implicates both substantive and procedural due process concerns. Substantive due process is implicated in that the challenged New York statute defines certain conditions under which title to personal property may be transferred from one person to another through the mechanism of a private sale, i.e., the statute establishes a substantive rule concerning the transfer of title to personal property. Procedural due process is implicated in that the challenged statute permits the transfer of title to occur without giving the transferor (Brooks) an opportunity to contest the transfer on the merits, i.e., the statute arguably deprives Brooks of a "fair hearing" on an issue of vital import to her.

26. For purposes of this article, it is not necessary to determine whether, under the authorization model, Brooks' claim would be based predominantly on substantive or procedural due process. Both strands of due process are almost certainly present, and either strand, or both in combination, provide an ample basis for permitting a merits challenge to the New York statute under the authorization model.

27. 436 U.S. at 156. Justice Rehnquist, in another part of his opinion, went on to state: "Thus, the only issue presented by this case is whether Flagg Brothers' action may fairly be attributed to the State of New York. We conclude that it may not." *Id.* at 157.

28. *Id.* at 157–64.

29. *Id.* at 164–66.

30. *Id.* at 157, 166.

31. *Id.* at 166.

32. Justice Stevens, in dissent, was not so confident that the reach of *Flagg Brothers* is limited to the characterization model setting: "The Court today holds that our examination of state delegations of power should be limited to those rare instances where the State has ceded one of its 'exclusive' powers." 436 U.S. at 178. Justice Stevens noted: "Indeed, under the Court's analysis as I understand it, the state statute in this case would not be subject to due process scrutiny in a *state* court." *Id.* at 177 n.15. Later portions of this article will address the concerns expressed by Justice Stevens in this dissent. *See* notes 88–94 and accompanying text *infra*.

what this neglect of the authorization model means for future cases in which the state has authorized, but not compelled, private conduct. Justice Rehnquist may be saying that failure to make out a state action claim under the characterization model automatically precludes consideration of a "merits" claim under the authorization model. If this is indeed Justice Rehnquist's position in *Flagg Brothers* and *Jackson*, those decisions have effectively immunized state acts of authorization from review on the merits in all situations in which the conduct authorized by the state cannot itself be regarded as state action. Whether such sweep should be given to the decisions in *Flagg Brothers* and *Jackson* is the question to which this article now turns.

II. THE AUTHORIZATION MODEL AND PROBLEMS OF PROCEDURE: HOW TO REACH THE MERITS

Within the legal framework of a given state, every private act is either prohibited, compelled, or authorized by state law. In cases involving a clearly private act prohibited by state law, the state action characterization and authorization models have no application. If a challenger is injured by a private actor engaging in conduct prohibited by state law, the challenger presumably has an adequate remedy under state law.[33] More importantly, in such a fact situation there is no offending state action for the challenger to attack. If the offending conduct is clearly private, the characterization model has no relevance to the fact situation. And, if the offending conduct is prohibited by state law, there is plainly no state act of authorization that can serve as a basis for attack under the authorization model. Thus, in the absence of offending state action, there is nothing to which either challenge model can relate.

If a person is injured by conduct that is compelled by state law, the characterization model applies. In *Flagg Brothers*, the Court summarized its position in this area: "Our cases state 'that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act.' "[34] Justice Rehnquist here conceded that when the act of a "private party" is compelled by state law, the act is properly attributable to the state.[35] Under the characterization model, the state's compulsion of particular conduct creates a sufficient "contact" between the state and that

33. If the private actor's conduct also constitutes a violation of federal statutory law, the challenger may, of course, seek appropriate legal redress for that violation. A typical example of such a violation would be discriminatory conduct by the private actor that violates a federal civil rights statute clearly applicable to private conduct. In that factual context, there would be no state action issue to consider.

34. 436 U.S. at 164 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970)).

35. *Id.*

conduct to warrant a conclusion that the conduct constitutes "state action." This conclusion generally eliminates the need for a resort to the authorization model. If "private" conduct compelled by state law constitutes state action, that conduct then becomes subject to all constitutional provisions that operate as a limitation on state power. Typically, the "private" conduct is of such a nature that, once it bears the state action label, it clearly constitutes a denial of due process, equal protection, or a violation of some other constitutional provision.[36] In such a fact pattern, the challenger has no need to press a claim under the authorization model.

The authorization model is thus confined to fact situations in which the state has authorized private conduct. Here, the concept of "authorization" needs explication. A state act of authorization may manifest itself in many forms: through a state statute,[37] the decision of a state administrative agency,[38] the provision of a state constitution,[39] or, in the absence of any of the preceding forms of authorization, through the state's common law as reflected in state court decisions.[40] Moreover, the state's act of authorization may be general[41] or narrow[42] in scope. Whichever form the state's act of authorization takes, the authorization model seeks to provide an avenue for challenging the authorizing act on the merits. This challenge may be attempted in the state court system or in the federal court system, and in each judicial system the challenger may encounter procedural difficulties that impede efforts to reach the merits. These

36. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), illustrates this point. As described by Justice Rehnquist in his opinion in *Flagg Brothers, Moose Lodge* "held that the Commonwealth of Pennsylvania, although not responsible for racial discrimination voluntarily practiced by a private club, could not by law require the club to comply with its own discriminatory rules." 436 U.S. at 164.

37. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). In *Burton*, Justice Stewart, concurring, viewed the Delaware statute under consideration "as authorizing discriminatory classification based exclusively on color." *Id.* at 727. A statute would also have been the challenged state authorization in *Flagg Brothers*.

38. *See Jackson*, 419 U.S. at 354–55.

39. *See* Reitman v. Mulkey, 387 U.S. 369, 370 (1967).

40. *See* Shelley v. Kraemer, 334 U.S. 1, 4–8 (1948).

41. In *Flagg Brothers*, the statutory authorization challenged is part of the New York Uniform Commercial Code, a comprehensive legislative enactment authorizing and regulating the conduct of commercial transactions across a wide spectrum of human endeavor. Moreover, the specific statutory provision at issue in *Flagg Brothers* deals broadly with the rights and interests of creditors and debtors in the enforcement of a warehouseman's lien. *See* 436 U.S. at 151 n.1.

42. In Reitman v. Mulkey, 387 U.S. 369 (1967), the state constitutional amendment challenge focused specifically on the activity of selling or renting real property and confined itself to the authorization of a seller's right to refuse to sell or rent "to such person or persons as he, in his absolute discretion, chooses." *Id.* at 371. As applied to state acts of authorization, the concepts of "general" and "narrow" are admittedly relative concepts. The degree of generality in a state act of authorization might bear upon the validity of the state act when it is reviewed on the merits; it should not bear upon the procedural propriety of permitting the act to be so reviewed.

procedural difficulties are examined below, particularly with reference to the Supreme Court's decisions in *Flagg Brothers* and *Jackson*.

A. The Authorization Model in the State Court System

1. General Considerations

In the state court system, the authorization model has not encountered serious procedural difficulties.[43] This result probably stems from the relative ease with which federal questions may be pleaded and resolved on the merits in the normal state court proceeding. Ever since *Martin v. Hunter's Lessee*,[44] the prevailing view has been that state courts have concurrent jurisdiction with the federal courts over cases involving a "federal question"[45] or, more technically, cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[46] Congress may, of course, grant to the federal district courts exclusive jurisdiction over federal questions of its own choosing.[47] In the absence of such a preemptive grant, state courts have the power to entertain federal questions and are under a constitutional obligation not to discriminate procedurally against such federal-question claims.[48]

To invoke the original jurisdiction of a federal court on the basis that a claim involves a federal question, a would-be plaintiff must show on the face of the complaint that the claim arises under the Constitution, the laws of the United States, or treaties made under the authority of the United States.[49] Under this "well-pleaded complaint" rule, it is not sufficient for the plaintiff to plead a claim arising under state law and to allege that the defendant will raise a federal question as a defense to the claim.[50] By way

43. That is, there have not been serious difficulties encountered in *reaching* the merits. The question of difficulties involved in *prevailing* on the merits is, of course, an entirely different matter.

44. 14 U.S. (1 Wheat.) 304 (1816).

45. *Id.* at 339–41.

46. U.S. CONST. art. III, § 2. Justice Story's opinion for the Court in *Martin* built upon the arguments advanced by Alexander Hamilton in THE FEDERALIST NO. 82, at 536 (Modern Library ed. 1941).

47. A modern example of such congressional grant of exclusive jurisdiction is 28 U.S.C. § 1334 (1976), which provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy." The congressional power to make such grants of exclusive jurisdiction to the federal district courts was upheld in The Moses Taylor v. Hammons, 71 U.S. (4 Wall.) 411, 430 (1867).

48. Testa v. Katt, 330 U.S. 386 (1947); McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934).

49. Little York Gold Washing & Water Co. v. Keyes, 96 U.S. 199 (1878). The Court's holding in *Keyes* imposed this requirement as a matter of statutory, and not constitutional, construction. C. WRIGHT, LAW OF FEDERAL COURTS § 18, at 69 (3d ed. 1976).

50. Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974); Louisville & N.R.R. v. Mott-

of contrast, state courts are not burdened with the well-pleaded complaint rule in the pleading and resolution of federal questions. If a federal-question claim is otherwise cognizable in a state court proceeding, it may be raised in the plaintiff's original complaint, the defendant's original answer, or in any other subsequent pleading by the plaintiff, defendant, or intervening third party.[51] This greater flexibility in the pleading and resolution of federal questions enhances the procedural efficacy of the authorization model in state court proceedings.

2. *Illustrative Decisions*

The Supreme Court's 1967 decision in *Reitman v. Mulkey*[52] illustrates the relative procedural ease with which a claim can be pressed under the authorization model in state court proceedings. In *Reitman,* the Court held that Proposition 14, an amendment to the California Constitution, was invalid as denying the equal protection of the laws guaranteed by the fourteenth amendment.[53] Proposition 14 was adopted in a statewide referendum in the 1964 general election. It prohibited any interference by the State of California or "any subdivision or agency thereof" with the right of any private owner of real property "to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."[54] The immediate purpose of Proposition 14 was to negate open housing legislation previously enacted by the California Legislature and, more generally, to prohibit all future open housing legislation.[55] In upholding the challenge to Proposition 14, the Supreme Court affirmed the California Supreme Court's conclusion that adoption of Proposition 14 "significantly encourage[s] and involve[s] the State in private discriminations."[56]

It is important to stress the procedural posture of the *Reitman* case in relation to the authorization model. In *Reitman,* "the Mulkeys, who are husband and wife . . . , sued [in a California trial court] under § 51 and § 52 of the California Civil Code alleging that [Reitman] had refused to rent them an apartment solely on account of their race."[57] Reit-

ley, 211 U.S. 149 (1908). *See generally* C. WRIGHT, *supra* note 49, § 18 (discussing the determination of federal question jurisdiction from the pleadings).

51. As shall be discussed presently, the progression of the pleadings in Reitman v. Mulkey, 387 U.S. 369 (1967), illustrates the facility with which a federal question may be introduced into a state court proceeding at stages later than the filing of the plaintiff's original complaint.

52. 387 U.S. 369 (1967).

53. *Id.* at 373.

54. *Id.* at 371.

55. *Id.* at 374.

56. *Id.* at 381.

57. *Id.* at 372 (footnote omitted).

man answered by alleging that the statutory provisions relied on by the Mulkeys "had been rendered null and void by the adoption of Proposition 14 after the filing of the [Mulkeys'] complaint."[58] Accordingly, Reitman moved for summary judgment on the pleadings, which was granted by the California trial court. The Mulkeys then appealed to the California Supreme Court, contending that Proposition 14 itself was invalid as denying the equal protection of the laws as guaranteed by the fourteenth amendment.[59] The California Supreme Court reversed the judgment of the state trial court and sustained the Mulkeys' contention concerning Proposition 14. This ruling, as noted above, was affirmed by the United States Supreme Court.

The Mulkeys' initial claim was one arising solely under California law, specifically the statutory provisions of the Unruh Open Housing Act.[60] In like manner, Reitman's initial defense arose solely under California law, Proposition 14, an amendment to the California Constitution. A federal question did not enter the case until the Mulkeys appealed to the California Supreme Court on the ground that California's adoption of Proposition 14 was state action that constituted a denial of equal protection under the fourteenth amendment. And, without procedural qualms, both the California Supreme Court and the United States Supreme Court proceeded briskly to a resolution of the federal question on the merits. Neither court was deterred by the well-pleaded complaint rule applicable to plaintiffs in federal-question cases brought in the lower federal courts.

From a procedural perspective, therefore, the authorization model operated effectively in the *Reitman* setting. Proposition 14 was state action[61] that authorized a particular type of private conduct. It is precisely that state act of authorization that the Mulkeys were able to challenge successfully on the merits. *Reitman* was thus resolved solely within the framework of the authorization model. There was no claim in *Reitman* that Reitman himself was a state actor. Accordingly, the *Reitman* decision

58. *Id.*

59. *Id.* at 373.

60. *See id.* at 374.

61. In his dissenting opinion in *Reitman*, Justice Harlan conceded this point without reservation: "There is no question that the adoption of [Proposition 14], repealing the former state anti-discrimination laws and prohibiting the enactment of such state laws in the future, constituted 'state action' within the meaning of the Fourteenth Amendment." *Id.* at 392. For Harlan the "only issue [was] whether this provision impermissibly deprives any person of equal protection of the laws." *Id.* The issue defined by Harlan is precisely the "merits" issue addressed by the authorization model. On the merits issue, *Reitman* supports this limited proposition: Once state action has prohibited racial discrimination in a given area of life, a repeal by the state of the prohibition must be "procedurally neutral," i.e., the repeal action may not impose a greater procedural burden on subsequent attempts to eliminate racial discrimination than existed before the repeal. For a fuller explication of the substantive scope of the *Reitman* holding, see Buchanan, *Federal Regulation of Private Racial Prejudice: A Study of Law in Search of Morality*, 56 IOWA L. REV. 473, 489–92 (1971).

supports the proposition that the authorization model can function well in state court proceedings without encountering significant procedural difficulty.

As stated above, state authorization may appear in many forms, including state common law as reflected in state court decisions. The classic case of *Shelley v. Kraemer*[62] well illustrates the operation of the authorization model in a state common-law setting. *Shelley* involved restrictive race covenants in a residential area in St. Louis, Missouri. For a term of fifty years, the applicable covenants restricted "use and occupancy" of the area to members "of the Caucasian race."[63] Fitzgerald, a white owner of real property within the restricted area, sold his property to black purchasers, Mr. and Mrs. J. D. Shelley. Soon thereafter, Mr. and Mrs. Louis Kraemer, white owners of neighboring real property within the restricted area,

> brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property [sold to them by Fitzgerald] and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct.[64]

The state trial court denied the requested relief on the basis that the restrictive race covenants were not operative under state law because the agreement containing the restrictive covenants had never been signed by all of the property owners in the residential area embraced by the agreement.[65] The Supreme Court of Missouri "reversed and directed the trial court to grant the relief for which [the Kraemers] had prayed."[66] The state supreme court "held the [restrictive] agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to [the Shelleys] by the Federal Constitution."[67] With the case in this posture, the United States Supreme Court granted the writ of certiorari sought by the Shelleys, reviewed the case on the merits, and held that "in granting judicial enforcement of the restrictive [agreement in this case, the state has] denied petitioners the equal protection of the laws and that, therefore, the action of the state [court] cannot stand."[68]

In relation to the procedural aspects of the authorization model, *Shelley* is analogous to *Reitman*. As in *Reitman*, the federal question in *Shelley*

62. 334 U.S. 1 (1948).
63. *Id.* at 4–5.
64. *Id.* at 6.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 20.

was not pleaded in the plaintiffs' original complaint. The Kraemers' initial claim arose solely under state law and was rejected by the state trial court on the basis of state law. The federal question entered the case at the level of the state supreme court when that court, after first holding that the restrictive race covenants were enforceable under state law, concluded that state judicial enforcement of the covenants "violated no rights guaranteed to [the Shelleys] by the Federal Constitution."[69] Once raised, the federal question encountered no procedural barriers; with no expression of procedural concern, both the state supreme court and the United States Supreme Court met and resolved the federal question on the merits, albeit with opposite results.

How does the authorization model operate in the common-law context of *Shelley*? A state's common law comprises the entire body of nonstatutory rules of law that are from time to time announced by the state's judicial system. At the time of *Shelley,* Missouri common law included a rule that authorized private persons to enter into restrictive race covenants in relation to real property. It is precisely that common-law rule that the Shelleys were able to challenge successfully. *Shelley* involved no claim that the persons entering into the restrictive race covenants were themselves state actors; such a claim, if made, would have been pursued under the characterization model. Instead, the constitutional attack in *Shelley* focused solely on the common-law rule that authorized the making of the covenants in question.

Admittedly, *Shelley* involved the enforcement of a common-law rule in specific state court proceedings. But, by the same token, *Reitman* involved the enforcement of a state constitutional amendment in specific state court proceedings. Whether the state rule is expressed in the state's common law, a state statute, or a provision of the state's constitution, the rule has the force of law in specific court proceedings only if the courts are willing to enforce the rule. Absent that willingness, the "rule" in question ceases to be a rule of law and, from the legal system's perspective, becomes merely an unenforceable exhortation to be followed or ignored at pleasure. Thus, the operation of the authorization model in state court proceedings does not vary with the form in which a state act of authorization is cast. Whether the setting is that of *Reitman* or *Shelley,* the federal question under this model remains the same: Does the state act of authorization (in whatever form it is cast) violate the United States Constitution? It is true that the state court's resolution of this question constitutes, independently, an act of the state.[70] But that form of state action is

69. *Id.* at 6.

70. "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition

always present in any state court resolution of any question, federal or otherwise, and does not bear upon the merits of the state authorization question that is the object of inquiry under the authorization model. Functionally, the state court proceeding in which this model is operative is merely the forum in which the state authorization question is reified and resolved on the merits.

Other examples exist of state court proceedings in which the authorization model was operative. In *New York Times Co. v. Sullivan,*[71] the United States Supreme Court reviewed on the merits the application in state court proceedings of Alabama's common-law libel rule.[72] In substance, the Supreme Court held that Alabama's common-law libel rule violated the Constitution because it authorized damage actions by plaintiffs under circumstances that abridged the free speech rights of persons or entities charged with making libelous statements.[73] As in *Shelley,* the *Sullivan* Court invalidated a state act of authorization expressed in the state's common law.

In *Evans v. Newton,*[74] Justice White in a concurring opinion considered the constitutional validity of private discriminatory conduct expressly authorized by state statute. *Newton* involved a gift to the city of Macon, Georgia, of a park "for white people only."[75] The gift was made

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which has long been established by decisions of this Court." *Shelley,* 334 U.S. at 14. In the common-law setting, analysis of the authorization model is complicated by the fact that state courts are performing two roles, legislative and judicial. In the same judicial proceeding, a state court both formulates and enforces a rule of law. This blending of functions should not obscure the fact that, from the perspective of the authorization model, a state court decision upholding the legality of a private act authorized by the common law is no different from a state court decision upholding the legality of a private act authorized by state statute. In both instances, the merits inquiry under the authorization model is directed to the constitutional validity of the state act of authorization.

On the merits, *Shelley* has stimulated much scholarly speculation. *E.g.,* Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion,* 110 U. PA. L. REV. 473 (1962). *See generally* G. GUNTHER, *supra* note 17, at 1002–13 (addressing the applications and limits of *Shelley*). Considered on its facts, *Shelley* would support at least this merits proposition: A race restriction in whatever form may not be used in legal proceedings to impair any contractual agreement which, under state law, would be legally enforceable in the absence of the race restriction. In this context, the race restriction becomes a mere precatory statement without legal potency. Whether *Shelley* has a broader reach on the merits is not clear. For a possible extension of *Shelley* to cases involving the "institutionalization of private racial prejudice," see the discussion in Buchanan, *supra* note 61, at 522–26.

71. 376 U.S. 254 (1964).

72. *Id.* at 262–64.

73. The Court stated:

> We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.

Id. at 264 (footnote omitted).

74. 382 U.S. 296 (1966).

75. *Id.* at 296.

under a will executed in 1911 by United States Senator Augustus O. Bacon. At the time Senator Bacon executed his will, a Georgia statute expressly authorized gifts to municipal corporations of the state of lands "dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose";[76] the statute further provided that such use might "be limited [by the giver] to the white race only."[77] After a lengthy analysis of this statute,[78] Justice White concluded:

> This case must accordingly be viewed as one where the State has forbidden all private discrimination except racial discrimination. As a result, "the State through its regulations has become involved to such a significant extent" in bringing about the discriminatory provision in Senator Bacon's trust that the racial restriction [in the trust] "must be held to reflect . . . state policy and therefore to violate the Fourteenth Amendment."[79]

Justice White's conclusion is expressed more in terms of characterization than authorization. White seems to be saying that the state authorization contained in the Georgia statute invested the race restriction in Senator Bacon's will with a taint of state action and converted "the infected private discrimination into state action subject to the Fourteenth Amendment."[80] An authorization analysis would have simply stated that the authorization contained in the Georgia statute was itself state action that constituted a denial of equal protection on the merits. Procedurally it is

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76. *Id.* at 305 (White, J., concurring) (quoting GA. CODE ANN. § 69-504 (1957)).

77. *Id.*

78. *Id.* at 305-12. In his analysis, Justice White placed special emphasis on the fact that the Georgia statute expressly authorized discrimination on the basis of race. *Id.* at 310-12.

79. *Id.* at 311 (quoting Robinson v. Florida, 378 U.S. 153, 156-57 (1964)). As noted previously, Justice Douglas' opinion for the *Newton* Court took a different route to the merits. *See* note 18 *supra*. Pursuing a characterization model analysis, Douglas' opinion noted the pervasive contacts that existed historically between the city of Macon and the park given to the city by Senator Bacon. These contacts, Douglas claimed, did not disappear with the city's resignation as trustee of the park and the substitution of "private" trustees for the city:

> The momentum [the city park] acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of "private" trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility. . . . If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment . . . .

382 U.S. at 301. Douglas' opinion thus represents a classic application of the "state nexus" technique under the characterization model. His opinion expressly avoided the state authorization issue that was decisive to Justice White. *Id.* at 300 n.3.

80. *Id.* at 306 (White, J., concurring). Viewed from an authorization model perspective, White's concurring opinion would support the following proposition: State action that expressly authorizes private racial discrimination constitutes a denial of equal protection under the fourteenth amendment. Such a proposition could also be used to invalidate state action that expressly authorizes private discrimination on the basis of classifications other than race, e.g., classifications based on color, national origin, sex, and religion. Whether Justice White's merits proposition could be applied without exception requires a consideration of policy that is beyond the scope of this article.

important to note that White's opinion, in a case originating in the state court system, did not hesitate to review on the merits a state act of authorization.

Burton v. Wilmington Parking Authority[81] also involved a Supreme Court decision in which the majority clearly proceeded within the framework of the characterization model.[82] Four Justices, however, recognized the possibility of an alternative authorization analysis.[83] In *Burton,* a Delaware statute authorized a restaurant owner to refuse service to "persons whose reception or entertainment by him would be offensive to the major part of his customers."[84] Eagle Coffee Shoppe, Inc., had refused service to Burton "solely because he is a Negro."[85] With varying degrees of enthusiasm, Justices Stewart, Harlan, Whittaker, and Frankfurter were each willing to review this statutory act of authorization on the merits.[86] *Burton,* therefore, represents still another case originating in a state court system and, in the minds of four Supreme Court Justices, admitting of ready resolution on the merits within the framework of the authorization model.

Other case examples could be cited,[87] but there is no need to gild the lily. Enough cases have been analyzed to show that in a state court setting the authorization model has encountered little or no procedural difficulty. With the same procedural ease, the United States Supreme Court has met and resolved such challenges when they have come before the Court from

81. 365 U.S. 715 (1961).

82. Applying the "state nexus" technique, Justice Clark's opinion for the court detailed the numerous contacts that existed between the State of Delaware and Eagle Coffee Shoppe, Inc., the private restaurant under consideration. The Court concluded that

> [t]he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Id. at 725.

83. *See id.* at 726 (Stewart, J., concurring); *id.* at 727 (Harlan & Whittaker, JJ., dissenting); *id.* at 730 (Frankfurter, J., dissenting).

84. 365 U.S. at 717 n.1 (quoting DEL. CODE ANN. tit. 24, § 1501).

85. *Id.* at 716.

86. In his concurring opinion, Justice Stewart was prepared to hold on the merits that the Delaware statute expressly authorized "discriminatory classification based exclusively on color" and that such a statute was "clearly violative of the Fourteenth Amendment." *Id.* at 727. In dissent, Justice Harlan, joined by Justice Whittaker, urged that "we should first ascertain the exact basis of this state judgment, and for that purpose I would either remand the case to the Delaware Supreme Court . . . or hold the case pending application to the state court for clarification." *Id.* at 730. While writing a separate dissent, Justice Frankfurter agreed generally with Harlan's approach of seeking construction of the statute by the Delaware Supreme Court. *Id.* at 730–31. The three dissenting Justices considered that, if Stewart's construction of the Delaware statute were correct, they would, in Harlan's words, "certainly agree, without more, that the enactment is offensive to the Fourteenth Amendment." *Id.* at 729.

87. *E.g.,* Evans v. Abney, 396 U.S. 435 (1970); Bell v. Maryland, 378 U.S. 226 (1964); Barrows v. Jackson, 346 U.S. 249 (1953).

the state court systems. As noted above, this result stems largely from the procedural flexibility of state courts in relation to the pleading and resolution of federal questions in state court proceedings.

3. *The Impact of* Flagg Brothers *and* Jackson *in State Courts*

What impact will *Flagg Brothers* and *Jackson* have upon the continuing efficacy of the authorization model in state court proceedings? The answer is unclear. In a footnote to his dissenting opinion in *Flagg Brothers,* Justice Stevens feared the worst: "Indeed, under the Court's analysis as I understand it, the state statute in this case would not be subject to due process scrutiny in a *state* court."[88] Stevens' fears will be realized only if the Court majority in *Flagg Brothers* intends its opinion to extend beyond the confines of the characterization model. Technically, the Rehnquist opinions both in *Flagg Brothers* and *Jackson* are limited to characterization. The opinions focus solely on whether particular conduct, ostensibly private in nature, may be regarded as state action.[89] The opinions do not expressly employ an authorization analysis. Neither opinion deals with whether a state act of authorization is itself constitutionally infirm by reason of the conduct that it authorizes.

Justice Stevens' fears, however, should not be dismissed too lightly. In Part IV of Justice Rehnquist's opinion in *Flagg Brothers,*[90] certain passages could be read as immunizing state acts of authorization from review on the merits.[91] If Part IV is viewed in totality, such a construction seems unjustified. Justice Rehnquist denies that "a State's mere acquiescence in a private action converts that action into that of the State"[92] and rejects "the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement.' "[93] These are clearly characterization model statements concluding that private conduct is not transformed into state action through state authoriza-

88. 436 U.S. at 177 n.15.

89. *See* note 27 and accompanying text *supra.*

90. 436 U.S. at 164–66.

91. For example, Justice Rehnquist stated that "the State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in [its authorizing statute] permits but does not compel, to threaten to sell [Brooks'] belongings." *Id.* at 165. Read in isolation, this statement could support the proposition that a state has no constitutional responsibility for private acts that it "permits but does not compel." As a substantive rule of constitutional law, such a proposition is so far-reaching that no Court decision should be construed as endorsing it unless that construction is inescapable.

92. *Id.* at 164.

93. *Id.* at 164–65.

tion or encouragement. However questionable this conclusion may be,[94] it does not preclude a direct challenge to the state act of authorization that has made the private conduct legally permissible. Accordingly, Justice Rehnquist's opinions in *Flagg Brothers* and *Jackson* should be read as being confined to the public function and state nexus questions comprising the traditional objects of inquiry under the characterization model. The opinions do not purport to have a broader scope.

A more fundamental concern supports the contention that *Flagg Brothers* and *Jackson* should not procedurally affect the operation of the authorization model in state court proceedings. This concern is the promotion of federalism values. In several areas of constitutional law, recent Supreme Court decisions have evidenced an increasing sensitivity to federalism values.[95] One example is the resolution of federal questions in state court proceedings.[96] Here, the Court has taken a position that en-

94. In his dissent in *Flagg Brothers,* Justice Stevens questions the validity of the distinction drawn by Rehnquist between "permission" and "compulsion": "[T]he distinctions between 'permission' and 'compulsion' . . . cannot be determinative factors in state-action analysis. There is no great chasm between 'permission' and 'compulsion' requiring particular state action to fall within one or the other definitional camp." *Id.* at 170. For a persuasive argument "that the *Flagg Brothers* Court erred by failing to apply the 'significant state-involvement' test of state action that has been developed in equal protection cases," see Comment, *Creditors' Remedies as State Action,* 89 YALE L.J. 538, 539 (1980).

95. In recent decisions, for example, the Court has defined narrowly the circumstances under which federal courts may issue injunctions against pending state court proceedings. *See* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (state court civil proceedings); Younger v. Harris, 401 U.S. 37 (1971) (state court criminal proceedings). *See generally* C. WRIGHT, *supra* note 49, § 52A (discussing "Our Federalism" abstention doctrine).

96. In both Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and Younger v. Harris, 401 U.S. 37 (1971), the challengers sought to vindicate federal rights in federal court by securing an injunction against pending state court proceedings. In both decisions, on the basis of federalism values, the challengers were remitted to their respective state courts for the resolution of the federal questions that they sought to raise in federal court. In *Huffman,* the court construed "pending" to include any state court proceeding as to which a losing litigant has not exhausted state appellate remedies. 420 U.S. at 610–11. In *Younger,* Justice Black's opinion for the Court stressed the federalism concerns that undergird the *Younger* and *Huffman* decisions:

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly inter-

courages, and in some instances even compels, litigants to seek resolution of federal questions in state rather than federal court proceedings.[97] Justice Rehnquist has been in the vanguard of this movement.[98] It would be anomalous, therefore, for Justice Rehnquist's opinions in *Flagg Brothers* and *Jackson* to serve as procedural barriers to the operation of the authorization model in state court proceedings.

Historically, the Supreme Court has accorded the states a generous

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fere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

401 U.S. at 44–45.

97. *E.g.*, Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971). *See generally* note 96 *supra* (discussing *Huffman* and *Younger*). In Paul v. Davis, 424 U.S. 693 (1976), the Court, by a more indirect route than in *Huffman* or *Younger*, reached a result that has the practical effect of forcing a litigant into state court for the resolution of his claim on the merits. In *Paul*, the challenger, Edward Charles Davis III, had been incorrectly listed as a "shoplifter" by the police department of Louisville, Kentucky. The list containing Davis' name and "mug shot" photo was then circulated by the police department among some 800 merchants in the Louisville metropolitan area. Shortly thereafter, Davis brought an action in federal district court under 42 U.S.C. § 1983 (1976) against Edgar Paul, Chief of Police of the Louisville Police Department. Davis claimed that the police department action had deprived him of a liberty interest in his reputation without procedural due process of law in violation of the fourteenth amendment. The Supreme Court, in an opinion by Justice Rehnquist, rejected Davis' procedural due process claim, holding:

> [A]ny harm or injury to [Davis' interest in his reputation], even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons we hold that the interest in reputation asserted in this case is neither "liberty" nor "property" guaranteed against state deprivation without due process of law.

424 U.S. at 712. In the course of his opinion, Rehnquist relied strongly on federalism values:

> [Davis] apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.

Id. at 701.

Functionally, the *Paul* Court's narrow construction of "liberty" and "property" for purposes of procedural due process claims forces Davis into state court for the resolution of his claim on the merits. Unlike the challengers remitted to state court in *Younger* and *Huffman*, Davis, in state court, could not pursue a federal claim, but rather had to pursue a claim for defamation under the laws of Kentucky. The result in *Paul*, however, is based on federalism concerns similar to those expressed by Justice Black in *Younger*. Moreover, the practical effect of both the *Younger* and *Paul* line of cases is to force litigants in those fact situations to resolve their substantive claims in state court. For other recent decisions in which the Supreme Court has used the technique of narrow construction of "liberty" and "property" to deny procedural due process claims initiated in the federal courts, see Bishop v. Wood, 426 U.S. 341 (1976), and Board of Regents v. Roth, 408 U.S. 564 (1972). *See generally* G. GUNTHER, *supra* note 17, at 646–69 (discussing property and liberty interests in due process analysis).

98. *See* Paul v. Davis, 424 U.S. 693 (1976) (Rehnquist, J.). As explained in note 97 *supra*, the Rehnquist approach in *Paul* does not lead to a resolution of a federal question in state court. The Rehnquist approach does, however, compel the litigant to resolve his substantive claim in state court, albeit in the form of a state law claim.

range of discretion in fashioning procedural rules for pleading and resolving federal questions.[99] That tradition should be continued in the specific area of constitutional challenges to the validity of state acts of authorization. No strong policy reason exists for immunizing such acts from review on the merits in state court proceedings.[100] Whatever may be the fate of the authorization model in federal court proceedings, a subject to be discussed shortly, a Supreme Court concerned with promoting the values of federalism should welcome the continued employment of that model in state court proceedings.

B. The Authorization Model in Federal Courts

1. General Considerations

The fate of the authorization model in federal courts remains uncertain. No Supreme Court decision has defined the procedural conditions under which a challenger in federal court may attack the constitutional validity of a state act of authorization. In fact, it is not certain that such an attack is procedurally possible under any conditions. Supreme Court decisions have resolved, on the merits, attacks begun in the lower federal courts against state acts that compel a particular form of conduct.[101] Such cases, however, have been handled procedurally under the characterization model. As conceded by the Court in *Flagg Brothers* and *Jackson,* conduct compelled by state action is properly attributable to the state;[102] the compelled conduct is itself characterized as state action and may therefore be challenged directly. The state-compulsion cases thus shed little predictive light on the future of the authorization model in the federal court

99. *See* Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1 (1950) (state courts may impartially apply doctrine of forum non conveniens to federal claims). *See generally* C. WRIGHT, *supra* note 49, §§ 45 & 46 (discussing state enforcement of federal law). *Reitman v. Mulkey, Shelly v. Kraemer,* and the other state authorization cases discussed in the text accompanying notes 52–87 *supra* are additional examples of the flexibility with which federal questions may be pleaded and resolved in state court proceedings. The flexibility accorded to state courts in dealing with federal questions may not, of course, be used to discriminate against federal claims as such. Testa v. Katt, 330 U.S. 386 (1947); McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934).

100. Only a "merits" proposition that the Constitution places no limits on state power to authorize private conduct would justify a procedural rule barring judicial review of state acts of authorization in state court proceedings. As urged in this section of the text, *Flagg Brothers* and *Jackson* should not be read as endorsing such a sweeping proposition.

101. *E.g.,* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177–79 (1972) (state may not require private club to comply with the club's own racially discriminatory rules concerning club membership and guest privileges); Anderson v. Martin, 375 U.S. 399 (1964) (state may not require that the candidate's race appear on political election ballots). In its broader aspect, *Moose Lodge* held that the action of a private club in excluding guests on the basis of race is not state action. 407 U.S. at 171–77.

102. *Flagg Brothers,* 436 U.S. at 164; *Jackson,* 419 U.S. at 357.

system. We await a clear pronouncement by the Supreme Court concerning a litigant's procedural capacity to challenge directly in federal court a state act that authorizes a particular form of private conduct.

The decisions in *Flagg Brothers* and *Jackson* do not contain the clear pronouncement that is needed in this area of the law. Admittedly, these cases involved private conduct authorized by state action—enforcement of a warehouseman's lien by private sale in *Flagg Brothers* and termination of service by a private electric utility in *Jackson*. And, in both cases, the challenger initiated her action in federal district court. As stressed earlier, however, both *Flagg Brothers* and *Jackson* purport to be characterization cases. In each case, Justice Rehnquist's opinion for the Court focused on whether the state-authorized private conduct could itself be regarded as state action. The opinions did not deal expressly with the challenger's procedural capacity to attack directly the state action authorizing the private conduct in question. Presumably, therefore, the procedural fate of the authorization model in the federal court system remains an open question.

2. *Surmounting Procedural Barriers to the Authorization Model in Federal Courts*

As noted before, federal-question jurisdiction in the lower federal courts is burdened with the well-pleaded complaint rule.[103] Under this rule, a plaintiff seeking to invoke the federal-question jurisdiction of a federal district court must plead the federal question on the face of the complaint.[104] The plaintiff must show that the claim itself involves a federal question. It is not sufficient for the plaintiff to anticipate in the complaint a federal question defense by his adversary.[105] The well-pleaded complaint rule thus applies to the litigant who seeks in federal district court to challenge directly the constitutional validity of a state act of authorization.

Can a claim based on the authorization model be stated in such a way as to satisfy the well-pleaded complaint rule? Here, the facts of *Flagg Brothers* are illustrative and suggest an affirmative answer. Under the authorization model, Brooks as challenger would not claim that Flagg Brothers is itself a state actor. Rather, Brooks would claim that the State

103. *See* notes 49 & 50 and accompanying text *supra*.

104. Little York Gold Washing & Water Co. v. Keyes, 96 U.S. 199 (1878); C. WRIGHT, *supra* note 49, § 69, at 326–29.

105. Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 128 (1974); Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908). *See generally* C. WRIGHT, *supra* note 49, § 18 (discussing determination of federal question jurisdiction from the pleadings).

of New York, through statutory enactment, has deprived her of due process of law in violation of the fourteenth amendment. More concretely, Brooks would claim that the New York statute authorizes a private actor to divest her of title to her stored goods through the mechanism of a private sale that affords her no opportunity to contest the divestment on the merits. This is a straightforward claim of deprivation of procedural due process that should satisfy the well-pleaded complaint rule.[106]

What form of action should Brooks employ in pressing her federal-question claim? Under the Federal Declaratory Judgment Act,[107] Brooks may, in "a case of actual controversy,"[108] seek a declaration concerning the validity of section 7–210 of the New York Uniform Commercial Code, the statutory provision authorizing Flagg Brothers to enforce its warehouseman's lien through private sale.[109] If Brooks obtains a judgment declaring the New York statute to be unconstitutional, she may seek "[f]urther necessary or proper relief based"[110] on the declaratory judgment. Such further relief could be in the form of an injunction that would prevent Flagg Brothers from pursuing a private-sale remedy under the New York statute.[111]

It should be stressed that the Federal Declaratory Judgment Act applies only in cases of "actual controversy."[112] The Supreme Court has held that the Act's reference to "actual controversy" codifies the "case or controversy" requirement contained in article III of the Constitution.[113] The Court also has noted that the Act, through use of the statutory word "may,"[114] has conferred on federal courts a discretionary power to determine whether to proceed to the merits under the Act, even if the article III

106. As noted earlier, Brooks' claim also has a basis in substantive due process. *See* note 25 *supra*.

107. 28 U.S.C. §§ 2201–2202 (1976).

108. *Id.* § 2201.

109. *See Flagg Brothers*, 436 U.S. at 151 n.1.

110. 28 U.S.C. § 2202.

111. In Powell v. McCormack, 395 U.S. 486 (1969), the Supreme Court granted declaratory judgment relief to Powell under the Federal Declaratory Judgment Act. The propriety of further relief under the Act, "including mandamus," was assumed in the Court's remand of the case to the D.C. Circuit "with instructions to enter a declaratory judgment and for further proceedings consistent with this opinion." *Id.* at 550. *See generally* C. WRIGHT, *supra* note 49, § 100, at 502–03 (discussing effect of state law upon availability and res judicata consequences of declaratory judgment).

112. 28 U.S.C. § 2201.

113. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239–40 (1937) ("The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense.").

114. The Federal Declaratory Judgment Act states that in "a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights . . . ." 28 U.S.C. § 2201 (emphasis added).

case-or-controversy requirement is met.[115] Accordingly, a federal court will dismiss a claim under the Act if the court concludes that the article III case-or-controversy requirement is not met; if the court concludes that the claim presents an article III case or controversy, it may, at its own discretion, still refuse to proceed to the merits if the court believes that the claim is not appropriate for judicial resolution. Such a refusal would generally occur in borderline fact situations wherein the article III case-or-controversy requirement is only minimally satisfied.[116]

Standing and ripeness are the two main ingredients of the case-or-controversy requirement.[117] Standing and ripeness have been labeled respectively the "who" and "when" of constitutional adjudication.[118] Standing focuses on the relationship of the litigant to the subject matter of the dispute. It raises the question whether the litigant is the proper party to seek resolution of the dispute. Ripeness, on the other hand, focuses on the question of timing. The inquiry is whether the dispute has evolved to a stage that is appropriate for judicial resolution. In more general terms, the standing and ripeness inquiries express the federal judiciary's desire "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[119] Because of the discretionary authority conferred by the Federal Declaratory Judgment Act, federal courts have a statutory blessing for pursuing standing and ripeness inquiries under the Act with particular zeal.

Looking to the facts of *Flagg Brothers*,[120] are the requisite standing and ripeness present for litigant Brooks to attack directly the constitutional validity of the New York statute authorizing Flagg Brothers to sell

115. In Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937), the Court held that the "Declaratory Judgment Act must be deemed to fall within [the] ambit of congressional power, so far as it *authorizes* relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends." *Id.* at 240 (emphasis added). *See also* United Pub. Workers v. Mitchell, 330 U.S. 75, 104 (1947) (Rutledge, J., concurring in part and dissenting in part) ("[T]he controversy as to [particular litigants] is not yet appropriate for the discretionary exercise of declaratory judgment jurisdiction.").

116. In Rescue Army v. Municipal Court, 331 U.S. 549 (1947), the Court, in an opinion by Justice Rutledge, noted the thin borderline that often exists between a fact situation that does not constitute a case or controversy in the constitutional sense and one which, although it satisfies the case-or-controversy requirement, is not appropriate for judicial resolution. Noting that the Court has traditionally "followed a policy of strict necessity in disposing of constitutional issues," Rutledge conceded that "often the line between applying the policy [and the case-or-controversy rule] is very thin." *Id.* at 568–71.

117. *See* G. GUNTHER, *supra* note 17, at 1604–15.

118. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973).

119. Baker v. Carr, 369 U.S. 186, 204 (1962).

120. *See generally* notes 9–13 and accompanying text *supra* (setting forth the *Flagg Brothers* facts).

her stored goods at a private sale? From both a standing and ripeness perspective, Brooks can argue persuasively that "concrete adverseness" is present in her attack on the New York statute. She is not a litigant who has merely "made a search of state statutes . . . with a view to picking out certain ones that [she believes] might possibly be used"[121] by others to her detriment at some indefinite time in the future. Rather, she faces an imminent sale of her stored goods by a creditor acting under the authority of the statute she seeks to challenge. From a standing perspective, she is the person who, above all others, will be uniquely affected by the threatened sale.[122] From a ripeness perspective, the threatened sale is both imminent and real; in the ripeness continuum of dispute evolution, there remains little, if any, uncertainty in the creditor's proposed course of conduct. Through the requirements of standing and ripeness the federal courts retain ample doctrinal tools to dismiss the claims of litigants who, unlike Brooks, want nothing more than to test the validity of state acts of authorization with which they disagree.[123]

Let us assume, therefore, that under the facts of *Flagg Brothers* litigant Brooks, in pursuing an authorization-model claim in federal district court, would be able to satisfy the well-pleaded complaint rule and that her claim would meet standing and ripeness requirements under the Federal Declaratory Judgment Act. A major procedural question still con-

121. Boyle v. Landry, 401 U.S. 77, 81 (1971).

122. In United States v. Richardson, 418 U.S. 166 (1974), the Court held that the challenger in that case lacked standing to question the constitutional validity of particular governmental action. The Court stressed that the impact of the governmental action on the challenger "is plainly undifferentiated and 'common to all members of the public.' " *Id.* at 177 (quoting *Ex parte* Lévitt, 302 U.S. 633, 634 (1937)). At another point in its opinion, the Court stated that the challenger "is seeking 'to employ a federal court as a forum in which to air his generalized grievances about the conduct of government.' " *Id.* at 175 (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)). In a companion case to *Richardson,* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), the Court again stressed the importance of the "particularized injury" concept in relation to the question of standing:

> We reaffirm *Lévitt* in holding that standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful.

Id. at 220–21.

123. The federal courts may, in appropriate cases, use the "generalized grievance" rationale of Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), and United States v. Richardson, 418 U.S. 166 (1974), to find a lack of standing or the "remote threat of injury" rationale of Boyle v. Landry, 401 U.S. 77 (1971), to find a lack of ripeness. For more recent cases in which the Court applied the "remote threat of injury" rationale to find a lack of ripeness, see Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974); Laird v. Tatum, 408 U.S. 1 (1972). *Rizzo, O'Shea, Laird,* and *Boyle* are also explainable in part on a lack-of-standing rationale.

fronts Brooks: Against whom does she bring her action? Here the authorization model must grapple with problems not present in the characterization model. Under the latter, the challenger is claiming that an ostensibly private actor is in fact a state actor. For the resolution of that claim, a direct action in federal court against the entity alleged to be a state actor is entirely appropriate. In this context, Justice Rehnquist, viewing *Flagg Brothers* as a characterization case, raised no procedural objection to the fact that Brooks had sued Flagg Brothers directly under 42 U.S.C. § 1983.[124] Although rejecting Brooks' claim that Flagg Brothers was itself a state actor, Rehnquist was apparently willing to concede that her action against Flagg Brothers under section 1983 was an appropriate procedural vehicle for the resolution of that claim.

Under the authorization model, the "proper defendant" issue must be analyzed in a different light. For example, in pressing an authorization claim under the facts of *Flagg Brothers,* Brooks would not be seeking a determination that Flagg Brothers is a state actor. Rather, she would be seeking a judicial declaration that section 7–210 of the New York Uniform Commercial Code has unconstitutionally authorized Flagg Brothers (a concededly private actor) to divest her of title to her stored goods through the mechanism of a private sale. Clearly, an action against the State of New York or the New York Legislature in its sovereign law-making capacity would be barred by the eleventh amendment.[125] Under the doctrine of *Ex parte Young*[126] the eleventh amendment would not bar an action by Brooks seeking an injunction against a state officer such as the New York attorney general or secretary of state.[127] But an injunction

124. *See Flagg Brothers,* 436 U.S. at 155–57 (Part II of the Rehnquist opinion).

125. U.S. CONST. amend. XI provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." In Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 122–24 (1828), the 11th amendment was held to bar a suit against a state governor in his official capacity. By ready analogy, the holding in *Madrazo* should preclude a suit against a state legislature in its official law-making capacity.

126. 209 U.S. 123 (1908).

127. In *Young* itself, the challengers brought their action against Edward T. Young, the attorney general of Minnesota. The challengers sought to restrain Young from acting under a state law they alleged to be unconstitutional. In holding that the challengers' action was not barred by the 11th amendment, the Court stated:

> The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

against the New York attorney general or similar state officer is not, as a practical matter, the type of relief that Brooks truly needs. It is not the New York attorney general or secretary of state that needs to be restrained from acting under the challenged New York statute; it is Flagg Brothers that needs to be restrained.

Policy and logic suggest, therefore, that Brooks should bring her action directly against Flagg Brothers under the Federal Declaratory Judgment Act. In pursuing such an action, Brooks could seek declaratory and, if necessary, injunctive relief.[128] In this context, Flagg Brothers itself would have every incentive to defend vigorously the constitutional validity of the New York statute under which it purports to act. For Brooks and Flagg Brothers, the question of the statute's validity is not a "dispute of a hypothetical or abstract character";[129] rather, it is a dispute that is "definite and concrete, touching the legal relations of parties having adverse legal interests."[130] On the question of statutory validity, Flagg Brothers thus becomes the ideal defendant for assuring "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[131]

Under the above-described action, Flagg Brothers, as defendant, would be serving the same function as is served by the state-officer defendant in the classic *Ex parte Young* situation. In both the authorization-model and *Young* situations, the challenger is attacking the constitutional validity of a state statute. In the latter situation, the challenger's action is brought against a particular state officer because it is that officer who, in his or her official capacity, has an immediate and practical interest in acting under the authority of the challenged statute.[132] Analogously, an authorization-model action should be brought against the particular private actor who, like Flagg Brothers, has the same immediate and practical incentive to act under the authority of the challenged statute.[133] In both

209 U.S. at 159–60. Justice Harlan, dissenting, argued that, as the "manifest" object of Young's suit was "*to tie the hands* of the *State*," it followed that "within the true meaning of the Eleventh Amendment the suit brought in the Federal Court was one, in legal effect, against the State . . . ." *Id.* at 174. While conceding that the *Young* Court "was engaging in fiction" to avoid the strictures of the 11th amendment, one eminent authority concludes that "in perspective the doctrine of Ex parte Young seems indispensable to the establishment of constitutional government and the rule of law." C. WRIGHT, *supra* note 49, § 48, at 209–10; *see also id.* at 207 ("There is no doubt that the reality is as Justice Harlan stated it . . . .").

128. *See* Powell v. McCormack, 395 U.S. 486, 550 (1969); 28 U.S.C. § 2202 (1976).

129. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).

130. *Id.* at 240–41.

131. Baker v. Carr, 369 U.S. 186, 204 (1962).

132. In *Young* itself, for example, the Court expressly noted that the Minnesota attorney general had evidenced "[b]y his official conduct" a belief in his duty "to compel" compliance with the state law there challenged. 209 U.S. at 160.

133. In an authorization-model action, a challenger such as Brooks would be conceding that

types of action, success against the targeted defendant yields efficacious relief for the challenger.

As noted earlier,[134] every private act within the legal framework of a given state is either prohibited, compelled, or authorized by state law. And it is admittedly true that private conduct authorized by state law often affects us in very concrete and adverse ways. If, for example, a person breaches a contract or commits a tort, the injured party is authorized by state law to seek legal redress for the injury. It is, therefore, theoretically possible that the malfeasor, under the authorization model, might seek to challenge the constitutional validity of the state act that authorizes the injured party to seek legal redress. Concededly, such a claim would possess concrete adverseness even though it clearly lacks substance on the merits.

The chance that the authorization model will encourage the institution of a host of frivolous constitutional claims is a danger that is more theoretical than real. As Professor Scott has written, the "idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom."[135] For reasons of financial self-interest, if no other, litigants and lawyers are not in the habit of pressing constitutional claims that are clearly without merit. If such claims are

Flagg Brothers is a private actor. Hence, the 11th amendment would present no obstacle to her action, and it would not be necessary to indulge in the *Ex parte Young* fiction of "no action against the state" for 11th amendment purposes. Brooks' action, however, would create the potential for intervention into her lawsuit by the state attorney general. A federal statute provides:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. § 2403(b) (1976). In relation to Brooks' action under the authorization model, this statute would permit the New York attorney general to intervene as a matter of right if the attorney general believed that such intervention were necessary to insure a vigorous defense of the state statute challenged by Brooks. The federal statute also gives implicit support to the procedural propriety of initiating an authorization-model action in federal district court against a private party: the statute clearly assumes that actions challenging the constitutional validity of state statutes may be initiated in federal court against "non-state action" defendants.

134. *See* text accompanying note 33 *supra*.

135. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 674 (1973). Elsewhere in his article, Professor Scott comments on the "floodgates of litigation" argument:

> When the "floodgates" of litigation are opened to some new class of controversy by a decision, it is notable how rarely one can discern the flood that the dissenters feared. The plaintiff . . . must feel strongly enough about the issue in question to pay the bills, and that both cuts down the flood and gives us at least a partial measure of his "stake" in the outcome.

Id. at 673–74.

pressed, techniques are available for prompt resolution and dismissal on the merits[136] or for prompt dismissal for want of jurisdiction.[137] The "avalanche of frivolous claims" argument thus lacks significant appeal as a basis for precluding challenges to state acts of authorization under the authorization model.

As a final procedural note, an authorization-model action under the Federal Declaratory Judgment Act would no longer encounter the amount-in-controversy barrier to federal-question jurisdiction in the federal district courts. In 1980, Congress eliminated the amount-in-controversy requirement from the statute conferring general federal-question jurisdiction on federal district courts.[138] That statute now reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."[139] Assuming that Brooks had properly pleaded a federal question on the face of her complaint, she would have met the jurisdictional requirements of the statute in its present form.[140]

3. *The Impact of* Flagg Brothers *and* Jackson *in Federal Court*

As stressed earlier, Justice Rehnquist's opinions in *Flagg Brothers* and *Jackson* do not expressly purport to deal with the authorization model in federal court. In state authorization-model cases, however, the holdings in *Flagg Brothers* and *Jackson* almost eliminate the potential fact situations in which a challenger can succeed on the merits in a characterization action.[141] In the light of these holdings, the authorization model remains,

136. *See* Bell v. Hood, 327 U.S. 678 (1946). In his opinion for the Court in *Bell*, Justice Black stated: "[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Id.* at 682.

137. *Id.* at 682–83. Justice Black there noted that "a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *See also* C. WRIGHT, *supra* note 49, § 18, at 72 ("Dismissal for want of jurisdiction is appropriate . . . if the federal claim is frivolous or a mere matter of form.").

138. Act of Dec. 1, 1980, Pub. L. No. 96–486, § 2(a), 94 Stat. 2369 (amending 28 U.S.C. § 1331 (1976)). Prior to this 1980 amendment, Brooks would have encountered serious difficulty in fitting her federal-question claim into any of the statutory exceptions to the amount-in-controversy requirement. *See generally* C. WRIGHT, *supra* note 49, § 32 (discussing statutory exceptions to the amount-in-controversy requirement).

139. Act of Dec. 1, 1980, Pub. L. No. 96–486, § 2(a), 94 Stat. 2369 (amending 28 U.S.C. § 1331 (1976)). As a historical sidenote, the elimination of the amount-in-controversy requirement in federal-question cases belatedly fulfills the lifelong dream of Joseph Story that an unencumbered federal-question jurisdiction be vested in the federal court system. *See* 1 THE LIFE AND LETTERS OF JOSEPH STORY 271 (W. Story ed. 1851).

140. The statute, of course, must be read and applied within the framework of the case-or-controversy requirement of article III of the U.S. Constitution.

141. Under the public-function strand of the characterization model, the challenger can succeed

for most litigants, the only available option for challenging state acts of authorization in the federal court system. If, for procedural reasons, authorization-model actions were barred from the lower federal courts, the practical result would be clear. State acts of authorization would be effectively immunized from attack by actions originating in the federal court system. In the federal courts, the authorization model would have remaining relevance only in cases originating in the state court system and coming to the United States Supreme Court on certiorari or appeal.

The preceding subsection of this article has labored to show that no procedural bar exists to the use of the authorization model in the federal court system. Assuming satisfaction of the well-pleaded complaint rule and the presence of the requisite degree of standing and ripeness, a litigant should be able, in federal district court, to attack a state act of authorization by bringing an action directly against the private actor who has the immediate and practical incentive to act under the granted authority. Because of the "special expertise" that federal courts bring to bear on the resolution of federal questions in general,[142] it makes little policy sense to bar federal courts from the resolution of federal questions in the specific context of litigation under the authorization model. Accordingly, *Flagg Brothers* and *Jackson* should be limited in scope to the characterization context that the Court in those cases expressly considered.

III. CONCLUSION

This article has argued that challenges to state acts of authorization should not be barred procedurally from resolution on the merits in either the state or federal court systems. Permitting such challenges would not, for reasons already stated, open the courts to an avalanche of abstract or frivolous claims in which litigants seek to challenge the constitutional validity of a wide array of state acts of authorization. More fundamentally,

only by showing that the "private" actor is exercising "a power 'traditionally exclusively reserved to the State.' " *Flagg Brothers*, 436 U.S. at 157 (quoting *Jackson*, 419 U.S. at 352). In his *Flagg Brothers* opinion, Justice Rehnquist indicated that such a showing would not be easy to make: "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.' " *Id.* at 158.

Under the state-nexus strand of the characterization model, the challenger cannot succeed merely by showing that the state has authorized the conduct in question. *Id.* at 164. In *Flagg Brothers*, Justice Rehnquist came very close to saying that only when the state, by its law, has compelled the conduct in question will the conduct be properly attributable to the state. *See id.* Presumably, under the state-nexus strand, Rehnquist would still be open to a state-action claim involving facts "approaching the symbiotic relationship between lessor and lessee that was present in *Burton*." Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972).

142. In a parallel context, the "special expertise" argument was advanced as a basis for removing the amount-in-controversy requirement in federal question cases. *See* C. WRIGHT, *supra* note 49, § 32, at 126 & n.4.

the authorization model provides the most effective procedural vehicle for challenging an important category of state action, i.e., state acts that authorize private conduct. The question of what types of private conduct may be validly authorized by state action does have constitutional significance. Accordingly, this question should not be immunized from judicial review in either the state or federal court systems. It is obviously true that a high percentage of state acts authorizing private conduct are clearly valid in a constitutional sense.[143] It is equally true, however, that a state's power to authorize private conduct is not absolute and that there are, constitutionally speaking, certain types of private conduct that a state should not be permitted to authorize.[144] In our constitutional system, the question of which decisions may be left by government to private choice is a fundamental one to which the courts should be permitted to speak on the merits. As expressed by Professor Tribe:

> To decide [in a given case] that the Constitution creates a zone within which government should be free simply to leave the disputed choice in private hands, is to make a defensible decision—but it is a decision about the substantive reach of specific constitutional commands rather than a decision about whether the government has *done* anything to which the Constitution speaks.[145]

In the spirit of Professor Tribe's remarks, the holdings in *Flagg Brothers* and *Jackson* should be limited to their immediate characterization-model context. In both the state and federal court systems, the authorization model should continue to be available as a ready means for reviewing the constitutional validity of state acts. To bar actions under this model from the courts would be to create an unnecessary procedural ellipsis in our constitutional framework; in terms of judicial review, state acts of authorization should not be out of bounds.

143. This would be true, for example, of most state acts, whether expressed in statutory or common-law form, authorizing private conduct in the areas of property, tort, and contract law.

144. The holdings in Reitman v. Mulkey, 387 U.S. 369 (1967), and Shelley v. Kraemer, 334 U.S. 1 (1948), illustrate that there are constitutional limits to a state's power to authorize private conduct. *See also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 726–27 (1961) (Stewart, J., concurring) (state statute which authorizes discriminatory classification by proprietor of a restaurant violates 14th amendment).

145. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18–7, at 1174 (1978). More generally, Professor Tribe supports the position that state acts of authorization should not be immunized from judicial review on the merits. *Id.* at 1171–74.